88- 1780

No.....

Supreme Court, U.S.
FILED
APR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

# THE SUPREME COURT OF THE UNITED STATES

## OCTOBER, 1989 TERM.

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**WILLIAM B. COOPER**
**Petitioner**

**v**

**RICHARD D. EISENMAN, LEONARD COSTA, HEATHER M. PAINE, ANDREW DUFRESNE, JOHN GUMBLETON and FRANK K. DUFFY JR.**
**Respondents**

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## ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI
## PETITIONER'S APPENDIX

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William B. Cooper

Pro Se

267 Sippewissett Road

Falmouth, Massachusetts 02540

508-548-2297

# A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the navigable waters and the waters of the United States, are the property of the sovereign people of the United States as established by common law, and whether the plaintiff/petitioner, as a citizen of the United States and as part of the body of the sovereign, holds a property or liberty right to use and enjoy these waters equal to that of any other person or corporation.?

2. Whether the plaintiff was entitled to an executive, administrative or procedural due process hearing to gain or protect a property or liberty right in the use of the navigable waters of the United States, by local officials who claimed authority over these waters?

3. Did the District Court err when that court failed to acknowledge and consider the authority of Congress, under the Constitution, Art I Sect 8 CL3, the "Commerce Clause," to establish economic regulations in the use of the navigable waters, and Title 33 USC Sect 403, and the attendant federal regulations, including 33 CFR 330.5 concerning the permits for the placement of obstructions such as mooring buoys or dolphins in the navigable waters of the United States.?

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## D. REPORTS OF DECISIONS BELOW

The decision of the United States District Court in Cooper v. Eisenman et al., Civil Action No. 86-2571-C allowed the defendant's Motion for Summary Judgment. The memorandum and order is reproduced in the Appendix.

The Decision of the United States Court of Appeals For the First Circuit in Appeal Cooper v. Eisenman et al., No. 88-1416 affirmed the decision of the district court and was ordered not for publication. It is reproduced in the Appendix, as is the denial of the Petition for Rehearing and Suggestion of Rehearing In Banc, at page A5.

## E. GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) The Order of the United States Court of Appeals for the First Circuit affirming the judgment of the United States District Court was dated December 9, 1988.

(ii) The Order denying the Appellant's Petition For Rehearing and Suggestion of Rehearing In Banc was entered January 13, 1989; the Mandate was issued on January 23, 1989.

(iii) Title 28 U.S. Code Section 1254 confers jurisdiction on this Court to review the Mandate and other decisions of the United States Courts of Appeals.

# F. CONSTITUTIONAL PROVISIONS, U.S. STATUTES.

## 1. *United States Constitution, Articles and Amendments*

Article I Section 8. The Congress shall have Power, To regulate Commerce with foreign Nations, and among the several states, . . .
Article VI. Section 3. . . . all executive and judicial officers, both of the United States and of the several states shall be bound by oath or affirmation to support this Constitution.
Amendment V. . . . . nor shall any person, be deprived of life, liberty, or property without due process of law; . . . . .
Amendment XIV. Section I. . . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Unites States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

## 2. TITLE 33, UNITED STATES CODE

Section 403—Obstruction of Navigable waters generally; . . . . .
The creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is prohibited: . . . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; . . . . . .

## 3. TITLE 42, UNITED STATES CODE

Section 1983—Civil Action For Deprivation of Rights
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

# G. STATEMENT OF THE CASE

## (1) Facts of the Case

As stated in the Verified Complaint, the Plaintiff, William B. Cooper, hereinafter Cooper, a resident of the Town of Falmouth, Commonwealth of Massachusetts, is a self-employed boat builder engaged in the trade of boat building and repair, with clients local, interstate, and foreign.

On April 20, 1984 Cooper applied for a mooring buoy/dolphin permit for Green Pond (Harbor), to local town harbormaster defendant Richard D. Eisenman hereinafter Eisenman, in compliance with the by-laws of the Town of Falmouth.

To Cooper's knowledge there was only one mooring buoy/dolphin permit classification, and as an elected representative town meeting member for Falmouth he was well aware of the fact that in 1982 and again in 1983 town meeting had refused to establish two classifications of mooring permits, private and commercial or type A & B.

There was and is no formal procedure to apply for a class B or commercial permit. It was therefore impossible under the by-laws for Cooper to apply for a commercial mooring permit.

Green Pond (Harbor) is subject to the ebb and flow of the tide, is navigable in fact, and therefore is part of the navigable waters of the United States, under the jurisdiction of the Army Corps of Engineers as defined by 33 U.S.C. Sect. 403.

The official waiting list for 1984, acquired during discovery would show Cooper was in 39th position on the list for a mooring permit in Green Pond.

In 1983, Green Pond Yacht Services Ltd. held 40 mooring permits, #60A to 99A in Green Pond (Harbor). Sometime during the period of December 1983 to January 1984, Green Pond Yacht Services Ltd. was sold to Cal Yachting Inc.

Sometime before or after Cooper filed an application for a permit in Green Pond, defendant Eisenman, issued the 40 permits formerly held by Green Pond Yacht Services Ltd. to the new corporation Cal Yachting Inc. who had recently purchased the only boatyard in that small harbor.

Eisenman had declared previously that mooring permits could not be sold.

The action of Eisenman granting 40 permits to one person, Cal Yachting Inc., who never made application or was on the waiting list, aggrieved Cooper, who believed that the permits should have been fairly distributed to the applicants on the waiting list as established by the town by-law and regulations. Such a distribution would have resulted in Cooper receiving either a mooring buoy permit or a more advantageous position on the waiting list.

Cooper sent a letter of complaint about the apparent transfer of mooring permits to Eisenman May 31, 1984. Eisenman never acknowledged this letter from Cooper.

On June 6, 1984, Cooper sent a letter of complaint to Eisenman's superiors, the Board of Selectman, requesting a hearing before that board to discuss Cooper's claim that Harbormaster Eisenman had violated Cooper's constitutional and civil rights. Cooper never received any acknowledgment of his letter.

In order to remedy this grievance, Cooper made a complaint to Barnstable County District Attorney Philip A. Rollins, on August 14, 1984. Rollins sent copies of Cooper's letters to Eisenman and the Board of Selectmen, to Falmouth Town Counsel Frank K. Duffy, Jr., a co-defendant in this action, and Rollins referred the matter of Cooper's (mooring buoy-permit) complaint to Duffy.

Cooper tried on six separate occasions to get a due process hearing before the Board of Selectmen, the last time being April 4, 1986. Having been repeatedly denied a due process hearing by the Board of Selectmen, Cooper instituted this action.

(2) Statement of the Proceedings in the Courts Below.
On September 4, 1986, Cooper filed suit in the United States District Court, District of Massachusetts, seeking a redress of grievance against the defendants. The Verified Complaint, verified by affidavit, made claims for injunctive relief and money damages under 42 USC Sections 1983, 1985, 1986 and Title 15 USC Sections 1 et. seq.; 28 USC Sec. 1331 and 1343.

Sufficient factual statements were made showing the District Court also had diversity jurisdiction under the Interstate Commerce provisions of

the United States Constitution and its Fifth and Fourteenth Amendments and Title 33 USC.

After a protracted discovery period, the plaintiff filed a "Motion to Compel Defendant's Response to Discovery Under Rule 37(d)" on February 28, 1987 and again filed a "Plaintiff's Motion to Compel Discovery and Certificated Under Local Rule 16" on August 14, 1987, to get complete answers from the defendants to the plaintiff's interrogatories. The District Court allowed this motion September 8, 1987.

The defendants, through their attorney, filed a "Motion of the Defendants For Summary Judgment" and an affidavit from Richard D. Eisenman on November 6, 1987.

The defendants had not completed discovery, and had not answered all of the plaintiff's interrogatories. Therefore the plaintiff filed a "Plaintiff's Verified Motion For Default" on November 9, 1987. This motion was denied by the District Court November 24, 1987.

The plaintiff filed a "Plaintiff's Verified Opposition to Defendant's Motion For Summary Judgment, memorandum, and Affidavit in Support of Opposition" on November 17, 1987.

The District Court held a hearing on the "Motion For Summary Judgment" on February 8, 1988.

On March 2, 1988, plaintiff filed a "Plaintiff's Verified Post Hearing Memorandum, Opposing Motion for Summary Judgment and Affidavit." In this memorandum to the District Court, plaintiff Cooper, in an attempt to clarify the issue of the navigable waters, included a copy of a letter from the Chief, Enforcement Section, Regulatory Branch, Army Corps of Engineers, which cited the Code of Federal Regulations (33 CFR Part 332.2) under which the Corps of Engineers established mooring buoy/dolphin regulations, and also explained that any mooring buoy/dolphin placed in the waterways not permitted by the Corps of Engineers are in violation of Federal law.

On March 9, 1988 the District Court granted the defendant's "Motion For Summary Judgment" and dismissed the case.

Plaintiff Cooper appealed under Rule 59 and 60 and this was denied.

The plaintiff filed an appeal to the United States Court of Appeals for the First Circuit and the appeal was denied December 9, 1988. The plaintiff/appellant filed a "Petition For Rehearing and Suggestion of Rehearing In Banc" and this was denied January 13, 1989.

## H. *ARGUMENT*

### QUESTION 1 ARGUMENT

Under the Common Law of England, which our ancestors brought to these shores with them, the waters where the tide ebbed and flowed were held by the king as sovereign. The king had title, as sovereign and in no sense as proprietor, to the navigable waters, but he held them in trust for his people and he could not dispose of them by grant or otherwise.

With the treaty of September 3, 1783, following the War of Independence, title to the navigable waters was transferred from the Crown of Great Britain to the United States. U.S. v. California 332 US 19 (1947). The United States, then comprising the thirteen colonies, had adopted the principals of common law, therefore the title of the Crown in the navigable waters passed to the sovereign of the United States, the people.

In the United States an unique situation arose where the people as sovereign, now held these waters in their name in trust for themselves.

It was an unquestionable principal of common law that all the navigable waters belonged to the sovereign, in other words the public; and that no individual or corporation can appropriate them to their own use., Commonwealth v. Charlestown, Pick 185-186 (1822).

This Court has held that the navigable waters of the United States are the "public property of the nation." Kaiser Aetna v. US 444 US 174 (1979).

The plaintiff/petitioner argues that he can claim, as a citizen of the United States, a property and liberty right in the navigable waters, in common with the sovereign people of the United States, as a part of the body of the sovereign, however minute, as long as his claim follows the procedure outlined in 33 USC Section 403.

This Court has ruled, in Board of Reagents of State Colleges v. Roth 408 US 571 (1972) that property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money, and due process protection is required for deprivations of liberty beyond the sort of formal constraints imposed by the criminal process.

Every member of the public should have an equal right to the use of the navigable waters, whether for private or commercial use, and no person should be denied one mooring buoy permit while another, commercial or private, should be permitted to hold 40 of these permits and be allowed to treat the space allocated on the navigable waters as chattel property to be bought and sold at will.

Navigable waters cannot be sold or monopolized, they can belong to no one but the public. Navigable waters are "publici juris" that is of public right being owned by the public. Swan Island Club v. Yarbrough CA NC 209F.2d 698, 701.

The navigable waters are not public property such as a highway or even a national park, where title rests in a proprietary right in a governmental department or official. The navigable waters belong to the people as sovereign, and the people hold title in sovereign right.

The plaintiff/petitioner argues that before any person can be deprived of his or her property and liberty right in the navigable waters of the United States, regardless of how miniscule or minute that right might be, due process is required by the Fifth and Fourteenth Amendments to the Constitution. But the Selectmen failed to hold a hearing on his claim in violation of the principal established in Goldberg v. Kelly 397 US 254 (1970).

## QUESTION No. 2 ARGUMENT

The First Circuit stated, per curiam, that the facts and procedural background are adequately stated in the District Court's opinion, but the district court did not state the fact that the plaintiff was not granted any hearing at all by the Board of Selectmen, under any Massachusetts law on the denial of his claimed property right in his position on the waiting list for a mooring buoy. Even if his allegation that he was being denied a property right was not upheld, the plaintiff was entitled to a due process hearing by the Board of Selectmen. In Goldberg v. Kelly supra this Court held that the right to an executive or administrative due process hearing to gain or protect a property right is guaranteed by the Constitution, even if the claim of a property right is proven later to be wrong.

The First Circuit and the District Court overlook the fact that the plaintiff's repeated requests for a hearing were denied or ignored by the Selectmen acting under color of state law.

The First Circuit and the district court overlooked the fact that the plaintiff/petitioner is also in the boatyard business, as so stated in the Verified Complaint.

There is no formal procedure to apply for a class B or commercial mooring buoy because legally there is no such permit under Town of Falmouth by-laws or state statutes. There is no provision for the harbormaster to permit or allow the informal transfer of multiple mooring permits from one commercial organization to another.

Since the town has provided for only individual mooring buoy permits, and a waiting list of applicants for such permits, the four different selectmen should have provided plaintiff-applicant Cooper with a hearing on his complaint that the town by-laws were not being followed by the defendant harbormaster. Cooper also made the complaint that his constitutional rights were being denied and that the defendant harbormaster could be liable under 42 USC Section 1983.

In regard to Goldberg v. Kelly supra, this Court declared, "the recipients had not yet shown that they were, in fact within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so." Board of Regents of State Colleges v. Roth 408 US 577 (1972).

The First Circuit and the District Court erred when both courts overlooked the fact that the plaintiff was never granted the right to be heard, never given any fair hearing to vindicate that he also had the right to a commercial permit, if such a classification was being informally made by the local harbormaster.

This Court has declared in Grannis v. Ordean 234 US 385, 394 (1914). "The fundamental requisite of due process of law is the opportunity to be heard."

There was no opportunity to be heard, a total denial of due process, in that there was no process.

The plaintiff under Goldberg v. Kelly supra and Monroe v. Cape 365 US 167 (1961) and hundreds of other civil rights cases, turned to the district court, which then failed to acknowledge the plaintiff had been denied a hearing. See Memorandum and Order Appendix page A6.

## QUESTION No. 3 ARGUMENT

Title 33 USC Section 403 clearly states that only with the affirmative authorization of Congress on plans approved by the Chief of Engineers, can an obstruction such as a dolphin or mooring buoy be placed in the navigable waters.

This Court has held, in Wisconsin v. Illinois 278 US 367 (1929), that the prohibition in 33 USC § 403 unless "affirmatively authorized by Congress" was intended to make mere state authorization inadequate.

The First Circuit agrees with the District Court's analysis that it is permissible for the local harbormaster to establish informal economic or commercial regulations, and issue permits for mooring buoys, obstructions, on the navigable waters.

This analysis is incorrect. The navigable waters of the United States are subject to the regulatory authority of Congress, under the Commerce Clause of the Constitution Art. I Sect. 8d3.

This Court declared in Kaiser Aetna v. U.S. 444 US 173 (1979), it has long been settled that Congress has extensive authority over this nation's waters under the Commerce Clause. Also quoting from Gibbons v. Ogden 9 Wheat. 1, 189, 6 L.Ed 23 1824, "Commerce includes navigation," and that the navigable waters are the public property of the nation and subject to all requisite legislation by Congress.

The issuance of commercial mooring buoy permits on the navigable waters is an act of commerce regulation and as such is the prerogative of Congress and not the local harbormaster. The District Court in its opinion made no mention of 33 USC Sect. 403 and the attendant federal regulations 33CFR 330.5 (a)(10) covering the placement of obstructions on the navigable waters.

If § 403 is enforced by the District Court, the plaintiff can stand on equal footing with all other applicants, and the applications can be considered by the Corps of Engineers on the merits and what will best serve the public. Commercial permits can be applied for by anyone who requires such a permit from the Corps of Engineers. Federal regulations would be acknowledged, and the plaintiff/petitioner would receive injunctive relief, equal protection and due process.

## CONCLUSION

Therefore, since the courts below failed to address the issue of title and ownership of the navigable waters of the United States, and ignored the authority of Congress to establish economic regulations on the navigable waters under the "Commerce Clause" of the Constitution, and ignored the requirements of title 33 USC Section 403, certiorari should be granted.

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By the plaintiff pro se.

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# APPENDIX

(Not for Publication)

THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

**No. 88-1416**

**WILLIAM B. COOPER,**
**Plaintiff, Appellant,**
**v.**
**RICHARD D. EISENMAN, ET AL.,**
**Defendants, Appellees.**

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
**[Hon. Andrew A. Caffrey,** *U.S. District Judge]*

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**Before**

**Campbell,** *Chief Judge,*
**Breyer and Torruella,**
*Circuit Judges.*

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*William B. Cooper* **on brief pro se.**
*Mark E. DeFossez, Karen M. Moran,* **and** *Morrison, Mahoney & Miller* **on brief for appellees.**

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**DECEMBER 9, 1988**

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*Per Curiam.* The facts and procedural background are adequately stated in the district court's opinion, so we do not repeat them here. Instead, we turn to plaintiff's arguments.

1. *Violation of local law.* Plaintiff argues that the town has never authorized the harbormaster to have two classes of mooring permits, but rather has insisted on a unitary system. If that is so, plaintiff at most would show a violation of town law, which does not itself amount to a *constitutional* violation redressable in federal court. *See, e.g., Creative*

*Environments, Inc.* v. *Estabrook*, 680 F.2d 822, 833 (1st Cir., *cert. denied*, 459 U.S. 989 (1982).

2. *Public trust/equal protection*. Plaintiff seems to be arguing that as a matter of either federal constitutional, statutory, or common law, every member of the public has an equal right to the use of the navigable waters such that a commercial entity cannot be permitted to hold 40 mooring permits while plaintiff is denied one. Plaintiff feels that such an allocation violates the public trust to which navigable waters must be held as well as the equal protection clause.

We agree with the district court's analysis that the differential treatment accorded commercial holders of permits and individuals is rationally related to the legitimate public interest in promoting commercial activity and therefore does not offend equal protection or due process.1 For much the same reason, we see no violation of any public trust. We simply see no basis for any one person one mooring permit rule in federal law.

3. *Town boundaries*. Plaintiff claims that a disputed issue of material fact precluding summary judgment is whether Green Pond lies outside the town's territorial boundaries. Plaintiff claimed below that it does and that the harbormaster's authority over mooring permits is limited to the town's territorial jurisdiction. If plaintiff is correct, then the town harbormaster has no authority either to grant or deny plaintiff a permit. As resolution of the factual issue will not assist plaintiff in obtaining the ultimate relief he seeks — a permit — it is not material to this litigation.

Nor is the location of the town's seaward boundary relevant to plaintiff's equal protection argument. Plaintiff seems to be arguing that if the harbors where the boat yards have mooring spots are outside the town's boundaries, then the town cannot have any legitimate interest in promoting commercial boat yards. there was no dispute that the land portions of the boat yards were within the town's boundaries. The argument is meritless.

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*We disagree with plaintiff's contention that an issue for trial is whether the transferability of commercial permits is in fact necessary to the economic viability of commercial boat yards. *See, e.g., Walsh* v. *Commonwealth of Massachusetts*, 618 F.2d 156, 159 (1st Cir. 1980) (no need to take evidence to determine whether a legislative classification is rationally related to a legitimate state interest).

4. *33 U.S.C. § 403.* Plaintiff argues that the district court erred in refusing to issue a declaratory judgment that all the commercial mooring permits issued by the harbormaster for Green Pond are void as a matter of federal statutory law. Plaintiff maintains that Green Pond is part of the navigable waters of the United States and hence any structure placed therein is subject to 33 U.S.C. § 403, which proscribes the creation of any obstruction not authorized by Congress to the navigable waters of the United States. While, by regulation, the Department of the Army has authorized "non- commercial, single boat, mooring buoys," *see* 33 C.F.R. § 330.5(a)(10), there is no such blanket authorization for commercial mooring buoys, and, plaintiff says, no federal authorization for any commercial mooring has been obtained. Hence, all the commercial moorings are void, plaintiff argues.

Section 403 does not create a private cause of action, *see California* v. *Sierra Club*, 451 U.S. 287 (1981), and we need not decide whether § 403 is enforceable via 42 U.S.C. § 1983 because we conclude plaintiff is not entitled to relief.

While § 403 proscribes unauthorized obstructions, plaintiff has not complained about the number of obstructions—in this case, moorings—but rather about the allocation of these obstructions in that he has not been accorded a mooring. Section 403, however, is not aimed at this sort of allocative type of dispute. In other words, the type of injury about which plaintiff complains is not the type § 403 is designed to redress. Consequently, plaintiff is not entitled to relief under § 403.

5. *Property interest under state law or town practice.* Plaintiff's position seems to be this: The 40 permits the harbormaster allowed Green Pond Yacht Services to transfer to Cal Yachting (as well as any other commercial mooring permit purportedly authorized by the harbormaster) are void. Therefore, at the very least, plaintiff should be second, rather than forty- second, on the waiting list for mooring permits. Plaintiff was denied a hearing concerning either his right to a permit or his place on the waiting list and hence he has been deprived of property without due process, plaintiff maintains.

We reject plaintiff's contention that, whether as a matter of custom, practice, or local law, he has a property interest in his place on the waiting list. Rather, we conclude that the list is at most a procedural means to an end—the obtainment of a permit. And, we need not decide whether state or local law accords plaintiff a property interest in a mooring permit. This is because we conclude that state law provides plaintiff with adequate procedures for challenging a permit denial, and

hence there is no denial of due process. *Hudson* v. *Palmer*, 468 U.S. 517, 530-36 (1984); *Parrat* v. *Taylor*, 451 U.S. 527 (1981).

If, as plaintiff indicated in his complaint, the authority of a harbormaster to grant mooring permits of the type plaintiff sought is established by Mass. G.L. ch. 91, § 10A, then the same statute also provides a means for challenging a permit denial. Section 10A states that "[a]ny person aggrieved by a refusal to permit [the] temporary mooring, or by any condition or restriction imposed relative to such mooring, may appeal to the division of waterways of the department of public works . . ." Mass. G.L. ch. 91, § 10A. Judicial review of an adverse decision would then appear to be available. *See* Mass. G.L. ch. 30A, § 14 (person aggrieved by a final decision of an agency in an adjudicatory proceeding entitled to judicial review); Mass. G.L. ch. 30A, § 1(2) (broadly defining agency).

To be sure, plaintiff may be complaining about more than a permit denial, for even if he is not now entitled to a permit, he wants to protect his place on the waiting list. The express terms of ch. 91, § 10A arguably may not provide for review of a dispute over the proper place on a waiting list. Rather, § 10A may require a would-be permit holder to wait until he can assert that he is presently entitled to a permit before seeking review under § 10A. In other words, as applied to plaintiff, if plaintiff's present claim is not that he is entitled to a permit now, but rather that he is entitled to be second on the waiting list, then plaintiff would have to wait until two more spots opened up, apply to the harbormaster at that time, and then seek review of the denial under § 10A. We see no procedural due process violation in postponing review until a person is able to assert a present entitlement to a permit. Such a system serves the rational purpose of avoiding what could turn out to be unnecessary litigation should a would-be permit holder sell his boat, move, die, or otherwise become uninterested in a mooring permit before he was entitled to one.

In short, if plaintiff could assert present entitlement to a permit under § 10A, then that section and Mass. G.L. ch. 30A, § 14 provided plaintiff a procedure for challenging the denial. If plaintiff could not assert present entitlement, but only possible future entitlement, we see no constitutional violation in denying review.

While plaintiff's complaint posited the harbormaster's authority over mooring permits on ch. 91, § 10A, plaintiff subsequently and now claims that § 10A is inapplicable and that the relevant statutory

authority for issuing the type of permit plaintiff wants is Mass. G.L. ch. 102, §§ 21, 26. If that is so, state law still does not leave plaintiff remedyless. Chapter 102, §§ 21, 26 does not set forth a procedure for challenging a permit denial, but it would appear that plaintiff could obtain a hearing on his claims and review of the denial in an action for certiorari or mandamus under Mass. G.L. ch. 249, §§ 4, 5. That mode of review is available when state law does not otherwise specify the manner for reviewing official action. *See, e.g., Caswell* v. *Licensing Commission*, 387 Mass. 864, 877 444 N.E.2d 1373, *review denied*, 394 Mass. 1102, 475 N.E.2d 401 (1985). Consequently, since state law provides an adequate procedure for challenging a permit denial, plaintiff has not been denied a permit without due process.

6. *Summary judgment*. Plaintiff contends that summary judgment for defendants should not have entered before plaintiff had completed discovery. In his opposition to defendants' motion for summary judgment, plaintiff did assert that certain defendants had not answered certain interrogatories. However, plaintiff did not adequately explain how the unanswered interrogatories could be material to any relevant issue. Most, if not all, of the interrogatories were answered by at least one defendant. We see no prejudice. There was no error in granting summary judgment for defendants.

Affirmed.

**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

No. 88-1416

**WILLIAM B. COOPER,**
**Plaintiff, Appellant**
**v.**
**RICHARD D. EISENMAN ET AL.,**
**Defendants, Appellees**

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**Before**
**Campbell, *Chief Judge*,**
**Coffin, Bownes, Breyer, Torruella and Selya,**
*Circuit Judges.*

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**ORDER OF COURT**
**Entered January 13, 1989**

The petition for rehearing and suggestion of rehearing in banc is denied.

By the Court:
Francis P. Scigliano, Clerk.

**Civil Action**
**No. 86-2571-C**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

**WILLIAM COOPER**
**PLAINTIFF,**

**v.**

**RICHARD EISENMAN, et al.**
**Defendants.**

# MEMORANDUM
**March 9, 1988**

**CAFFREY, S.D.J.**

This controversy arises from the plaintiff's dissatisfaction with the fashion in which the Town of Falmouth issues mooring permits for its harbors. The plaintiff claims that the harbormaster and the town selectmen have violated his rights to equal protection and due process under the United States and the Massachusetts Constitutions. The defendants have moved for summary judgment.

The facts are undisputed. Under an informal system developed by the harbormaster, applications for mooring permits are divided into two classifications. Class "A" permits are issued to individual boat owners and are retained until a holder no longer wishes to re-apply or otherwise surrenders it. Class "A" permits are not transferable. Once a permit is surrendered, the harbormaster reassigns it to another individual holder. Class "B" permits, on the other hand, are issued to commercial boatyards. If a commercial boatyard is sold to a new owner, the mooring permits are transferred along with the business. Although no formal legislative authorization for this practice of classifying permits exists, the practice has been established in Falmouth for sixteen years.

In 1984, the plaintiff duly applied to the harbormaster for a mooring permit. Because the demand for Class "A" permits exceeded the supply, the plaintiff's name was placed on a waiting list. Just prior to his application, however, Green Pond Yacht Services, Ltd., a commercial boatyard holding approximately forty mooring permits, sold its

business to Cal Yachting, Inc. According to the long established practice described above, the harbormaster permitted Cal Yachting, Inc. to retain the use of the mooring permits previously held by Green Pond Yacht Services. This action aggrieved the plaintiff who believed that the permits should have been distributed to the individual boat owners then on the waiting list. Such a distribution would have resulted in the plaintiff receiving a more advantageous position on the waiting list. In order to remedy this grievance, the plaintiff requested a hearing before the Board of Selectmen for the Town of Falmouth. The Board denied his request and this action followed.

The plaintiff claims that the defendants have violated his right to equal protection under both the United States and Massachusetts Constitutions by creating a distinction between privately held, non-transferable Class "A" permits and commercial Class "B" permits which are freely transferable. Because no fundamental right or suspect class is involved, the plaintiff has the burden of proving that the town's practice is not rationally related to a legitimate governmental interest. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973). Because the challenged action is in the nature of an economic regulation, it must be upheld if there is any conceivable legitimate purpose that may be served by the action. *McGowan v. State of Maryland*, 366 U.S. 420, 426 (1961).

The Court finds that the challenged practice is rationally related to legitimate governmental interests. The Town of Falmouth has both an interest in promoting commercial activity within its confines and an interest in ensuring that scarce resources and benefits are distributed fairly among those persons desiring to obtain them. The practice of permitting commercial mooring permits to be transferred to the new owner upon the sale of a boatyard while prohibiting the free transfer of privately held mooring permits is a reasonable means of accommodating both these interests. Unless the commercial permits are transferable, an established boatyard operator would find it difficult, if not impossible, to find a buyer for his or her business, perhaps forcing a liquidation. Prospective boatyard operators would be forced to wait until enough permits to operate the business profitably became available, if ever. The town is entitled to treat the holders of commercial permits differently from other holders in order to avoid this result. On the other hand, the town is not required to allow the free transfer of all mooring permits simply because it grants boatyards the privilege of transfer. Allowing privately held permits to be freely transferred would not promote commercial activity and would allow mooring permits to

be controlled for years by the same groups of people, diminishing their availability for other individuals as a result. In sum, since there are legitimate reasons for treating private and commercial holders of mooring permits differently, no equal protection violation exists in this case.

The plaintiff argues strenuously that the harbormaster lacked the authority to establish or continue the classification of mooring permits into Class "A" and Class "B" permits. Whatever the merits of this argument may be under state law or town by-laws, mere lack of authority would not create an equal protection problem where none otherwise exists. Equal protection analysis inquires only into whether classification has a legitimate basis. If a legitimate purpose is served by the classification, then the equal protection clause is satisfied whether or not the official creating the classification had authority to do so.

In addition to his equal protection claims, the plaintiff asserts that the refusal of the Board of Selectmen to grant him a hearing amounted to a denial of due process. The plaintiff implicitly concedes that he must have a property interest before the right to due process attaches. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). The plaintiff points first to his position on the waiting list and secondly, to the interest he has in the harbors of Falmouth as both a Massachusetts resident and United States citizen. He asserts that both are property interests within the meaning of the Fourteenth Amendment.

The Court rules that the placement of the plaintiff's name on the waiting list gave rise to no property interest protected under the due process clause. In order to have a property interest, the plaintiff must have a "legitimate claim of entitlement" to a benefit. *Roth*, 408 U.S. at 577. At most, the placement of the plaintiff's name on the waiting list gave rise only to an expectancy of receiving a mooring permit at some undetermined future date. The mere expectancy of a benefit is not a property interest sufficient to require due process protection. *Id.* Nor does the plaintiff have any property interest derived from his residency in Massachusetts or his United States citizenship that is protected by the due process clause. Due process procedural safeguards protect individual property rights, not general rights belonging to the public at large.

Even assuming that the plaintiff acquired a property interest by merely applying for a permit and being placed on the waiting list, the Court finds it difficult to see how the plaintiff's interest could have been deprived by the transfer of permits between Green Pond Yacht Services

and Cal Yachting, Inc. This transfer took place before the plaintiff had even applied for a mooring permit. At the time of the transfer, the plaintiff did not have any interest at all in a mooring permit, not even an expectancy. The plaintiff cannot logically claim a due process hearing with respect to the deprivation of a property interest that was non-existent when the alleged deprivation occurred.

In view of the foregoing, the defendants' motion for summary judgment is appropriately granted. Because the analysis is essentially the same under the Massachusetts Constitution, summary judgment is also granted in favor of the defendants on the pendent claims. *Commonwealth v. Henry's Dry Wall Company, Inc.*, 366 Mass. 539, 547 (1974).

Order accordingly.

Andrew A. Caffrey
Senior District Judge

**CIVIL ACTION**
**NO. 86-2571-C**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

**WILLIAM COOPER,**
**Plaintiff,**
**v.**
**RICHARD EISENMAN, ET AL.,**
**Defendants.**

**ORDER**
**March 9, 1988**

**CAFFREY, S.D.J.**

In accordance with memorandum filed this date, it is
ORDERED:

1. Defendants' motion for summary judgment allowed.
2. Case dismissed.

Andrew A. Caffrey
Senior District Judge